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No. 96-1286

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HAGELIN, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

Section 437g(a)(8)(A) of the Federal Election Campaign Act of 1971 (FECA) provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under [Section 437g(a)(1)], or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). The questions presented are:

1. Whether petitioners' suit is moot where, because of the passage of time, the 120-day statutory period, from which petitioners sought an exemption, no longer precludes judicial review of their administrative complaint.

2. Whether the district court had jurisdiction over petitioners' suit with respect to alleged violations of the Act that are the subject of an administrative complaint pending before the Federal Election Commission, prior to the expiration of the 120-day statutory period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 97 F.3d 553. The district court's oral ruling (Pet. App. A16-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1996. A petition for rehearing was denied on October 15, 1996. Pet. App. 34. The petition for a writ of certiorari was filed on February 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, permits "[a]ny person who believes a violation of th[e] Act * * * has occurred" to file a signed and sworn complaint with the Federal Election Commission (FEC or Commission). 2 U.S.C. 437g(a)(1). The FECA sets forth detailed procedures that the Commission must follow when it receives a complaint under Section 437g(a)(1). Within five days, the Commission must notify any person alleged in the complaint to have violated the Act, and that person (the respondent) then has 15 days to demonstrate, in writing, why no action should be taken against it. *Ibid.* The Commission may then vote on whether it has "reason to believe" that the respondent has violated the Act. 2 U.S.C. 437g(a)(2). If the Commission makes that determination, it notifies the respondent of the alleged violation and conducts an investigation. *Ibid.* If, at the close of the investigation, the Commission's General Counsel recommends that the Commission vote on whether there is "probable cause" to believe the respondent violated the Act, the respondent must be provided with a brief by the General Counsel and be given 15 days to submit a responsive brief. 2 U.S.C. 437g(a)(3).

If the Commission determines that probable cause exists, it must attempt for at least 30 days (or, if an election is imminent, at least 15 days) to correct the violation by informal methods and to enter into a conciliation agreement. 2 U.S.C. 437g(a)(4)(A)(i) and (ii). If the Commission is unable to correct a violation by informal methods, it may institute a civil enforcement action in federal district court. 2 U.S.C. 437g(a)(6)(A).

Section 437g(a)(8)(A) of the FECA provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under [Section 437g(a)(1)], or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). Under Section 437g(a)(8), the court "may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days." 2 U.S.C. 437g(a)(8)(C). If the Commission fails to so conform, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original [administrative] complaint." *Ibid.*

2. Petitioners in this case are the Natural Law Party of the United States and that party's 1996 presidential and vice-presidential nominees. On September 6, 1996, petitioners filed an administrative complaint with the FEC. The complaint alleged that the Commission on Presidential Debates (CPD), a private, nonprofit corporation formed to sponsor debates by presidential and vice-presidential candidates, had adopted unlawful criteria for the selection of participants in its upcoming 1996 presidential debates. Petitioners contended that the selection criteria violated Section 441b of the FECA, 2 U.S.C. 441b, and an FEC regulation, 11 C.F.R. 110.13, that permits certain nonprofit corporations to sponsor candidate debates without violating Section 441b's prohibition of corporate contributions. Petitioners requested that the Commission expedite its con-

sideration of their complaint so that they would have an opportunity to take further legal action before the first debate, which was scheduled for October 6, 1996. Pet. App. A6, A19.

3. One week later, on September 13, 1996, petitioners filed suit against the Commission and the CPD in the United States District Court for the District of Columbia. The complaint sought as relief an order enjoining CPD from employing the challenged selection criteria and, in the alternative, an order compelling the Commission to take immediate action on petitioners' administrative complaint against CPD. See Pet. App. A6.

In expedited proceedings, the district court consolidated petitioners' motion for preliminary injunctive relief with a hearing on the merits on October 1, 1996.[1] At the conclusion of that hearing, the court denied petitioners' request for preliminary injunctive relief and dismissed their claims for lack of subject matter jurisdiction. The court explained that Congress had granted the Commission "exclusive primary jurisdiction" to consider civil claims under the Act, and that the Act precluded the court from exercising jurisdiction in such matters until the Commission took final action, or until 120 days after petitioners' administrative complaint had been filed. See Pet App. A7, A23-A25.

4. The court of appeals granted expedited review. On October 4, 1996, it affirmed the district court's

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[1] That hearing was, in turn, combined with a hearing in another case against the Commission and CPD brought by the presidential and vice-presidential candidates of the Reform Party, who had also filed an administrative complaint with the Commission. Pet. App. A19.

dismissal of petitioners' claims on jurisdictional grounds. Pet. App. A1-A15. The court of appeals "agree[d] with the district court that it lacked jurisdiction to adjudicate the validity of the complaints filed with the FEC or to order the FEC to do so before the CPD-sponsored debate on October 6, 1996." *Id.* at A8. Congress, the court stated, "could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA." *Ibid.* (citing 2 U.S.C. 437c(b)(1), 437d(e)).

The court observed that "Section 437g requires the FEC to proceed with due deliberation after it receives a complaint alleging violations of the Act." Pet. App. A8. In light of that administrative framework, the court concluded that it could not "ignore these elaborate statutory requirements and force the FEC to act immediately because otherwise [petitioners] would suffer irreparable harm." *Id.* at A9.

Finally, the court observed that, "[e]ven if we could somehow ignore the jurisdictional requirements of § 437g(a)," petitioners "could not achieve the result [they] seek[]." Pet. App. A10. The court explained that it would have authority to order the Commission to take action only if the Commission's failure to act were contrary to law. "Since the FEC is given 120 days to act on a submitted complaint, § 437g(a)(8)(A), its delay in this case is neither unlawful nor unreasonable." *Id.* at A11.[2]

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[2] A suggestion for rehearing en banc was denied on October 15, 1996. See Pet. App. A34.

ARGUMENT

Petitioners seek review of the court of appeals' decision that the district court lacked jurisdiction to consider their claim before the expiration of the 120-day statutory period. Because the statutory period has now expired, and because the Presidential debates that petitioners sought to challenge have taken place, the question presented by the petition is now moot. Moreover, because the decision below would not otherwise warrant this Court's review, the petition should be denied.

1. Petitioners seek a ruling from this Court that the district court had jurisdiction to consider their claims before the expiration of the statutory period. See, *e.g.*, Pet. 13. Because that period expired on January 4, 1997, the 120-day restriction no longer precludes judicial review of petitioners' claim, and petitioners cannot benefit from the relief they seek here. The question presented by the petition is therefore moot. See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) ("In general, a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (internal quotation marks omitted); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'") (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)); see also *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90 (1947) (federal court may not issue declaratory judgment if claim has become moot).

Petitioners contend (Pet. 15) that the question whether the district court had jurisdiction over their

claim is not moot because they plan to participate in the political process for elections in the year 2000. That contention miscomprehends this Court's mootness jurisprudence.

The Court has recognized a narrow exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). As this Court has explained:

> [I]n the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975). Accord *Murphy* v. *Hunt*, 455 U.S. at 482.

This case does not meet the second element of that test; it is highly speculative whether petitioners will file an administrative complaint with the Commission with respect to debates for elections in the year 2000. Moreover, there is no "reasonable expectation" that, in the future, petitioners will file an administrative complaint so close to the date of scheduled debates that the Commission will lack adequate time in which to resolve the complaint.[3] To the contrary, it should

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[3] Unlike judicial proceedings, the administrative complaint procedure that is afforded by Section 437g(a)(1) has no standing requirement. Thus, petitioners need not wait to be excluded from a future debate before filing a complaint with the FEC. Here, the selection criteria that petitioners challenge

be presumed that petitioners will henceforth present any administrative complaint within a time period that will allow full and adequate consideration of their claims by the FEC and, if necessary, by the courts.[4]

As we demonstrate below, the court of appeals' decision in this case would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness. Because the Court would not otherwise grant review in this case, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because the controversy has subsequently become moot. Accordingly, the petition should be denied. See *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[5]

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were announced over a year before the date of the first Presidential debate. See Pet. App. A5.

[4] Nor is the 120-day period clearly "too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. at 149. In seeking review by this Court, petitioners did not seek certiorari before judgment, see Sup. Ct. R. 11, or other emergency relief, nor did they file a petition for a writ of certiorari before the expiration of the 120-day period that was the basis for the decision below.

[5] Because the decision whether to grant review on any issue (including mootness) is discretionary with this Court, Sup. Ct. R. 10, we consistently have argued that the Court should deny review of cases that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, when such cases do not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the merits); Robert L. Stern, Eugene Gressman, Stephen K. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993)

2. The court of appeals' holding that the district court lacked jurisdiction to consider petitioners' claims before the expiration of the 120-day period is correct, and does not warrant further review. In *Cort* v. *Ash*, 422 U.S. 66 (1975), this Court held that a complainant seeking injunctive relief under the FECA must at least first exhaust administrative remedies before the Commission. *Id.* at 75-76 & n.9.[6] When Congress subsequently amended the FECA, in 1976, it confirmed that construction by specifying that the FEC's jurisdiction over civil enforcement is "exclusive," 2 U.S.C. 437c(b)(1), and it clarified that, except as provided in Section 437g(a)(8), the power of the Commission to initiate civil actions under Section 437g "shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. 437d(e). See also *Gabauer* v. *Woodcock*, 594 F.2d 662, 673 (8th Cir.) (en banc), cert. denied, 444 U.S. 841 (1979); *McNamara* v. *Johnston*, 522 F.2d 1157, 1161-1162 (7th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

(discussing *Velsicol* doctrine and stating that the Court appears to follow the argument advanced in the government's brief in that case); but see 13A Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1994) (disapproving *Velsicol* doctrine and stating that vacatur under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), is always appropriate when case becomes moot before Court grants certiorari). Denial of certiorari is especially appropriate in this case, because the petition neither requests, nor suggests the possibility of, vacatur under *Munsingwear*. We have provided petitioner a copy of the United States' Brief in Opposition in *Velsicol*.

[6] The Court further held that no implied cause of action for damages exists under the FECA. *Cort* v. *Ash*, 422 U.S. at 77-85.

Congress created only one narrow exception to the Commission's "exclusive jurisdiction to determine how and when" to enforce the federal campaign finance statutes. *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 485-486 (1985). A private complainant may bring a civil action against the FEC only "[i]f the FEC dismissed [his or her] complaint or failed to act on it in 120 days." 470 U.S. at 488. If the district court then orders the FEC to pursue the complaint, the complainant may proceed in court directly against the respondent in the administrative proceeding "[i]f, and only if, the FEC fail[s] to obey such an order." *Ibid.*

As the court of appeals observed, it must be "assume[d] that in formulating [Section 437g's] procedures Congress * * * knew full well that complaints filed shortly before elections, or debates, might not be investigated and prosecuted until after the event." Pet. App. A10. Yet Congress included no exception for such circumstances in the text of the Act when it foreclosed judicial review until an administrative complaint is dismissed or the 120-day period has elapsed. In contrast, other provisions of the Act expressly shorten applicable time periods in anticipation of an approaching election. See 2 U.S.C. 437f(a)(2); 2 U.S.C. 437g(a)(4)(A)(ii); see also *United States* v. *Gonzales*, No. 95-1605, 1997 WL 85006, at *3 (Mar. 3, 1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Here, petitioners filed suit against the FEC and CPD just seven days into the 120-day statutory period, and before the FEC was able to take action on

their administrative complaint. Their suit therefore was precluded by the plain language of Sections 437d(e) and 437g(a)(8).

Petitioners suggest that the decision below conflicts with decisions of other courts of appeals that have recognized limited exceptions to the exhaustion doctrine. Pet. 10-11 (citing, *e.g.*, *Information Resources, Inc.* v. *United States*, 950 F.2d 1122 (5th Cir. 1992); *Venen* v. *United States*, 38 F.3d 100 (3d Cir. 1994)). Section 437g(a)(8), however, contains not only a jurisdictional requirement of exhaustion, but also an unequivocal restriction on federal court jurisdiction for a fixed period of time. See *FEC* v. *National Conservative Political Action Committee*, 470 U.S. at 488. Moreover, as the facts of this case illustrate, where neither of the conditions precedent to jurisdiction have occurred, a court is not in a position to "declare that the dismissal of the [administrative] complaint or the [Commission's] failure to act is contrary to law." 2 U.S.C. 437g(a)(8)(C). The cases cited by petitioners are therefore inapposite.[7]

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[7] In any event, the cases cited by petitioners recognize a narrow exception to certain statutory exhaustion requirements "when administrative remedies are inadequate." *Information Resources, Inc.* v. *United States*, 950 F.2d at 1126; see also *Venen* v. *United States*, 38 F.3d at 104. As we have explained, see note 3, *supra*, the FEC's inability in this case to dispose of petitioners' administrative complaint before the Presidential debates began resulted from the timing of petitioners' decision to file that complaint, not from any inadequacy inherent in the administrative mechanism.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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